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Supreme Court
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HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM 1955.

No. 474

WINSTON M. REYNOLDS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ZACH H. DOUGLAS,
Lynch Building,
Jacksonville, Florida;
W. W. JUDGE,
Daytona Beach, Florida;
CRAMPTON HARRIS,
1018-19 First National Building,
Birmingham, Alabama;
FRANK S. TWITTY,
Camilla, Georgia;
CLYDE W. ATKINSON,
Centennial Building,
Tallahassee, Florida;
CHARLES R. ADAMS, JR.,
Camilla, Georgia.

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No.

WINSTON M. REYNOLDS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Winston M. Reynolds, the petitioner herein, prays that a writ of certiorari be issued to review the final judgment and decree of the United States Court of Appeals for the Fifth Circuit entered in Case No. 15,284 in that court, entitled *Winston M. Reynolds, Appellant vs. United States of America, Appellee,* affirming a judgment of conviction by the United States District Court for the Northern

District of Florida on five counts of a six count indictment, each charging a gambling tax offense; the sentences on the several counts aggregating seven years imprisonment, $12,500 in fines and costs of court.

REPORTS OF OPINIONS BELOW.

The District Court entered judgment and imposed sentence but did not hand down an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion appears herein, however, at Appendix "A", Page 31.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed and the time of its entry is August 23, 1955.

2. Petition for rehearing was filed on September 12, 1955, and order denying the same was entered on September 29, 1955, without an opinion. Upon application, the United States Court of Appeals for the Fifth Circuit entered its order on October 4, 1955, staying the mandate of that court for thirty days to enable petitioner to apply for a writ of certiorari.

3. The statutory provision conferring jurisdiction on this court to review the opinion and judgment in question is set forth in *28 USCA 1254*, which provides in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTIONS PRESENTED FOR REVIEW.

On the original appeal, seven rulings of the trial court were claimed to be erroneous. On application for rehearing, two of those rulings were urged in toto and one in part, namely (1) denial of the motion to dismiss; (2) denial of judgment of acquittal and (3) lack of jurisdiction under Counts 5 and 6, together with sixteen additional grounds which had neither been presented nor briefed to the court, and twelve of which involved errors which had not been called to the attention of the trial court.

We present for review the following questions:

Question 1: By instructing the jury,

> "If this evidence shows that he was in fact, engaged in the operation of a lottery for profit, then your verdict in this case will have to be that of guilty. If the government has failed to show that then the defendant is entitled, at your hands, to a verdict of not guilty.", (R. 714)

did not the trial judge direct a verdict upon a false issue and deprive the petitioner of a jury trial so as to require a reversal of this case?

Question 2: Where the trial judge summarizes, simplifies and unitizes the issue for the jury in the following language,

> "When you look through the law and understand it and see what the question is that you have to determine here, then you'll realize that your question is a fairly simple one. You don't have to be bothered with the complicated tax requirement the law requires as to the tax, the payment, whether or not it was paid or its amount or any of those things. All you've got to decide is whether or not this defendant as charged in this indictment is the banker they've been calling in this case in a lottery operation conducted at Beachwood Farms. That's all you have to decide. You don't have to decide whether or not he has filed his return satisfactorily or any of those other things.", (R. 714)

does he not thereby remove the federal tax feature from the consideration of the jury and transform the case into a prosecution in a federal forum for conduct which is solely a violation of a state statute?

Question 3: Did the trial court err in failing to fairly instruct the jury upon the essential elements of the offenses sought to be charged in the indictment and the nature and character of the evidence necessary to support a verdict of guilt?

Question 4: Did the trial Judge err in his failure to read to the jury the statute under which the prosecution was framed, or to explain in his own language the kind and character of wagers upon which a tax is imposed and the wagers specifically excepted by the statute involved? (26 USCA 3285 b.)

Question 5: Did the trial court err in failing to fairly instruct the jury of the legal necessity for the commission of an affirmative act and the nature of such act necessary to support a conviction of evasion of the subject tax, in addition to the willful neglect or non-payment of such tax, and by giving a directly opposite statement that "the natural presumption would be, if a person consciously, or intentionally, did not register as required by the Internal Revenue regulations * * * and pays the occupational taxes and thereby the Government did not receive such taxes, that he, the defendant, intended to defeat the tax." (R. 708.)

Question 6: Did the trial court err in denying petitioner's motion for an acquittal?

Question 7: Did the trial court have jurisdiction over the offenses sought to be charged in Counts 5 and 6 of the Indictment?

Queustion 8: Did the trial court err in denying petitioner's motion to dismiss the indictment?

Question 9: Did the court err in failing to instruct the jury under the provisions of Rule 31(c) of Federal Rules

of Criminal Procedure, to the effect that they did not have to convict the petitioner of the maximum offense charged but might find him guilty of the lesser offense of a misdemeanor?

Question 10: Are the errors in the court's oral charge so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest so that the Appellate Court should have taken account of them under Rule 52(b) of the Federal Rules of Criminal Procedure?

Question 11: Is the excise tax on wagers (26 USCA 3285) unconstitutional as violative of the guarantee of immunity from self-incrimination contained in the Fifth Amendment, United States Constitution, and as an invasion of the powers reserved to the state by the Tenth Amendment, United States Constitution?

Question 12: Should this Honorable Court overrule its decision in *United States v. Kahriger*, 345 U. S. 22, and hold that the occupational tax provisions of the Revenue Act of 1951 (26 USCA 3290) are unconstitutional as violative of the guarantee of immunity from self-incrimination contained in the Fifth Amendment, United States Constitution, and as an invasion of the powers reserved to the states by the Tenth Amendment, United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SUPREME COURT RULE INVOLVED.

The constitutional provisions involved are:

Amendment V to the Constitution of the United States reading in part as follows:

> "* * * Nor shall he be compelled in any criminal case to be a witness against himself * * *"

Amendment VI to the Constitution of the United States reading in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; * * *"

Amendment X to the Constitution of the United States reading as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The statutes involved are 26 USCA, Sections 3285, 3290, 3291, 3294(c), 2707(c), 2707(b) and 3297. These statutes are set out verbatim in Appendix "B", Pages 52 to 56.

Federal Rules of Criminal Procedure, 52(b) and 31(c), Appendix "B", Page 56.

Florida Statutes, Annotated, 1954, Sec. 849.09, Appendix "B", Page 56.

The Supreme Court rule involved is:

> Supreme Court of the United States Revised Rules effective July 1, 1954, Rule 19, Considerations Governing Review on Certiorari, Sub-Paragraph 1(b) reading in part as follows: "Where a Court of Appeals. . . .has decided an important question of Federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision."

STATEMENT OF THE CASE.

A. Pleadings.

Count 1 charged petitioner with attempting to evade and defeat the payment of the wagering occupational tax from July 1, 1952 up to and including June 30, 1953, and Count 2 from July 1, 1953 up to and including November 28, 1953, in violation of Sections 3285 and 3290 of the Internal Revenue Code.

Counts 3 and 4 charged petitioner with attempting to evade and defeat the payment of the excise tax on wagers during the months of October, 1953 and November, 1953,

respectively, in violation of Section 3285 of the Internal Revenue Code.

Counts 5 and 6 charged petitioner with failing truthfully to account for and pay the excise tax on wagers for the months of October, 1953 and November, 1953, respectively, in violation of Section 3285 of the Internal Revenue Code.

Each count charged that the offense was knowingly, wilfully and feloniously committed.

The plea was, not guilty.

A motion for change of venue was denied but is no longer urged as error since there is no report of the examination of jurors on their voir dire.

Motion to dismiss the indictment was denied; likewise a motion for judgment of acquittal. The indictment is appended as a footnote to the opinion by Judge Rives, Appendix A, pp. 31-33 and also appears R. 1-5.

B. The Facts.

At 12:30 P. M. (R. 35) on Saturday, November 28, 1953, the Sheriff of Leon County, Florida, together with eight state and local law enforcement officers (R. 32, 33) began executing a state issued search warrant on Beachwood Farms, located about 3½ to 4 miles from Tallahassee (R. 34). These state officers remained on the premises until 4:00 P. M.

There were no federal officers participating in the raid at all (R. 31).

The state officers searched two buildings; the home of Mr. Reynolds and a separate two-story building (R. 39) containing on the ground floor a garage or workshop for repairing neon advertising signs for taxicabs (R. 580-584) and in the southwest corner upstairs offices of the Acme Taxi Neon and Acme Indian Sales Corporation (R. 553), furnished with general office equipment and furnishings (R. 117).

The petitioner Reynolds met the state officers in front of the workshop, where he had been working on signs with two high school boys (R. 580) during the morning. When the sheriff served the search warrant, Reynolds told him, "Bill, you don't need this—you can search my place anytime." (R. 35.)

Officer Strickland, closely followed by Officer Coggins, immediately ran upstairs to the Acme Taxi Neon Office (R. 86, 130). They found Mrs. Mazie Lambert, an employee of Acme Corporation (R. 208), the sole occupant of the office (R. 167). The matron at the jail searched Mrs. Lambert after her arrest and found some $1639 on her person (R. 208-224). This money had been sent to her from time to time by her husband from Korea (R. 226).

The officers found no other money in the office (R. 61, 117) but found there and confiscated two adding machines, one typewriter (R. 69-71), a shortwave radio (R. 44) and several bundles of paper from a concealed

panel in a closet (R. 87). The officers confiscated a third adding machine from another room in the garage building and a fourth from Reynold's home and grouped all confiscated articles in the office to be photographed by the police photographer (R. 48, 59), who arrived about 2:30 (R. 212).

Mr. George Owens, a Government witness, described the game of Cuba as it is operated in Florida (R. 388-393, both inclusive). Mr. Alson C. Lancaster, another Government witness, also described the game of Cuba (R. 445-447). We summarize:

In the Florida game of Cuba people bet small amounts (10¢ to $1.00, averaging 25¢) on any number from 1 to 100. If they win they get 70 for 1. They bet with a seller who deals with a pick-up man who deals with the banker. If they are in the same town, the banker and the pick-up man deal face to face. If in different towns the pick-up men call over the telephone and report the amounts of the bets made with them on the different numbers. The winning numbers are the last two digits of the winning numbers announced each Saturday by the Cuban National Lottery.

While the State officers had petitioners and Mrs. Lambert in the office over the garage, a telephone call came in. An officer answered it. Petitioner yelled, "Police, it's the police." (R. 53.) Thereupon an officer took petitioner and Mrs. Lambert out of the building and put them in a deputy sheriff's car. The officer at the telephone said, "Go ahead" (R. 91) and the caller gave him

a series of 98, 4 digit numbers and twice during the call said "none" (R. 94). He did not announce dollars and cents. The officer wrote down the figures (R. 91) and added the dollar mark and decimal points himself (R. 95). About 2:15 p. m. another call came in from a woman who asked if the officer were ready and gave her name as Bossie, and gave him some numbers of 4 digits, of which he made a memorandum (R. 133). She gave exactly 100 individual figures (R. 137). When she got to the figure number 50 she said "stop" and called out exactly 50 more (R. 138).

The same officer answered another call about 2:35 p. m. and jotted down the figures which the caller gave him (R. 140). At about 2:15 p. m. another call came in over the other phone in the office. The caller wanted to talk to Mr. Reynolds and when informed that petitioner was not there the caller said, "No, no, Coco talk to Mr. Reynolds." (R. 99, 125.)

About 4:00 p. m. a Mrs. W. D. Harrell of Quincy, Florida called in. The officer taking the call identified her voice (R. 174). He pretended to put petitioner on the phone saying, "Just a minute, I'll let Mr. Reynolds talk to you" or, "I'll let you talk to the boss, Winston" and turned the phone over to the sheriff and wrote down Mrs. Harrell's name (R. 76).

Mrs. Harrell asked if the sheriff (who said he was Joe) knew they had her husband in jail and informed him that she had gathered all the stuff up and wanted to know what to do about it (R. 175). The sheriff then told her

to get all the stuff over to Tallahassee as quick as she could and he went "personally out there to make the contact but there was no results to this contact." (R. 76-77.)

The Government introduced telephone toll tickets to show the time pattern of calls coming in to the two phones in the upstairs office and calls going out. Incoming calls were related to the time when the books close to prevent cheating and the outgoing calls were subsequent to the announcement over shortwave radio of the Cuban winner (R. 271, 274, 275, 296, 298, 299, 301, 303, 430, 432, 433, 437).

Government witnesses testified that the calls coming in were from telephone owners who, with one exception, were neither customers nor salesmen of the Acme Taxi Neon and the Acme Indian Sales Corporation (R. 537, 538, 574-575).

Government witnesses testified that the papers taken from the concealed panel were master-sheets for a Cuba banker. Although the sheets were not dated, the encircled number at the top of each sheet was a winning number of the National Lottery of Cuba on some week from October 3rd to November 21st, 1953.

Mr. Klein, a witness for the defendant, testified that it is not the general pattern in Florida to circle the winning number (R. 661); that circled numbers usually indicate the code number of a writer (R. 662); the winning numbers on the papers found in the concealed panel had fallen on several other dates also (R. 669) and that he had

raided a banker's headquarters (R. 651), had investigated extensively in Leon County and did not find anything against petitioner (R. 656) and that he had seen the office at Beachwood Farms and had never seen a bolita headquarters equipped like it (R. 651-652). In the banker's headquarters he raided in Jacksonville, eight people were working to handle about $4,000.00 worth of business (R. 569). At a headquarters in Clearwater the tickets from $1467.00 worth of sales could not possibly be tabulated in 2½ hours (R. 660), and that it would be a physical impossibility for 1 or 2, or as many as 6 people to tabulate $15,000.00 worth of business in 2 hours (R. 659).

The doors of the offices were not kept locked (R. 517, 559, 589) and were apparently not locked on the day of the raid (R. 121, 122). Many defendant's witnesses testified they had seen no evidence of gambling headquarters at Beachwood Farms. It was a rendezvous for children who rode the ponies and drove the two little automobiles on the premises.

Petitioner admitted to the witness Lancaster that he had been in the lottery business through October, 1951 (R. 466). He told the printer that if the Federal tax on gambling became a law he would go around the world (R. 232). The last printing of Cuba tickets was ordered by petitioner in December, 1951 (R. 242) although orders were filled in December, 1952 for some person by the name of C. W. Harris, the name which had been used by petitioner in his dealings with the printer in 1950 or 1951.

No witness testified that petitioner ever accepted a bet or paid a bet on any occasion after the gambling tax act went into effect. No witness testified as to any affirmative act on the part of the defendant showing an attempt to evade the imposition of the tax. No witness testified to any act of concealment by him. The testimony of the officers that at the beginning of the raid they heard a noise above them like someone slamming a door or slamming a drawer (R. 36, 62, 86, 129, 148) could only refer to an act by Mrs. Lambert and not by petitioner who was downstairs in the custody of the sheriff.

JURISDICTION IN COURT OF FIRST INSTANCE.

The basis for a federal jurisdiction in the District Court is provided by *Title 18, United States Code, 3231,* which provides in part: "The District Courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States." The indictment charged violations of Sections 3285 and 3290 of the Internal Revenue Code of the United States and 26 USC 3297 and 2707(c).

ARGUMENT ON REASONS FOR GRANTING THE WRIT.

A. The pertinent provision of Rule 19, of the Revised Rules of the Supreme Court of the United States applicable in the case before this Honorable Court are: The Court of Appeals has decided a Federal question in

a way in conflict with applicable decision of this Court; The Trial Court and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and the Court of Appeals has so far sanctioned such a departure by a Lower Court, as to call for an exercise of this Court's power of supervision.

As to Question 1:

The quoted language of the trial court's instructions to the jury was a directed verdict upon a false issue. The operation of a lottery was but a single element, and a subordinate one, of the crime sought to be charged against appellant. It plainly directed and commanded the jury to forget and disregard any instructions previously given concerning willful attempt to evade or defeat a tax or willful failure to account for and pay over, for which crimes appellant was on trial.

It is a fundamental rule of our legal system that a federal judge cannot direct a verdict in a criminal case. Mr. Justice Harlan started the line of decisions enunciating this principle with his opinion in the case of *Sparf v. United States,* 156 U.S. 51, 39 L. Ed. 343.

Mr. Justice Reed speaking for the court in *United Brotherhood v. United States,* 330 U. S. 395, 91 L. Ed. 973, reaffirmed the principle. *United States v. Raub,* 177 F(2d) 312, 315, is to the same effect.

Even in cases where the evidence is conclusive of the guilt of an accused, it is nevertheless prejudicial and reversible error to directly or indirectly direct a verdict of guilty in a criminal case. See *United Brotherhood v. United States, supra.*

The reasoning which prevents a federal judge from directing a verdict of guilty would prevent him from directing a verdict on a single false issue. He has no power, thus, to limit the duty of a jury. The language of Stephens, J., in *Morris v. United States,* 156 F(2d) 525 at Page 528 is directly in point.

As to Question 2:

The quoted language came in the concluding portion of the trial judge's charge. The trial judge, at this point in his instructions, definitely undertook to pinpoint and simplify the problem to be solved by the jury, when he said, "When you look through the law and understand it and see what the question is that you have to determine here, then you'll realize that your question is a fairly simple one." (R. 714.) Plainly, we think, this language was calculated to invite the jury to use a simple and practical test in deciding upon their verdict without regard to the "complicated tax requirements the law requires as to the tax, the payments, whether or not it was paid or its amount or any of those things." (R. 714.)

Having thus set the stage, the trial judge's very positive direction was "All you've got to decide is whether or not this defendant as charged in this indictment is the banker they've been calling in this case a lottery operation conducted at Beachwood Farms." (R. 714.) The court's language was clear and explicit when he repeated that the lottery operation by appellant was: "All you've got to decide—."

But the trial judge did not stop there; he reiterated and emphasized it by the following repetition: "That's all you have to decide." (R. 714.)

Aside from the fact that the jury was not reminded in the trial judge's simple, but deadly, solution of the problem that the jury must believe appellant was the "Banker" beyond and to the exclusion of every reasonable doubt, the obvious result was that earlier inadequate and perfunctory statements of the legal issues involved were not only negated and confused but they were obliterated and destroyed beyond peradventure.

The issue in this case was not whether the petitioner had violated the lottery law of the State of Florida, but whether he had violated Sections 3285 and 3290 of 26 USCA of the Internal Revenue Code. It is to be noted that the language of the charge copied in Question 1 immediately follows the language made the basis of Question 2. With this summation and simplification of the law the tax feature was taken from the case. The warrant had been issued by a state court. It had been served by state officers. The charge of the court reduces the question before the jury to the commission of a state crime.

The act under which the indictment was drawn has been questioned as an invasion of the powers reserved to the states. This case is a striking illustration of the fact that the application of the act results in a state trial in a federal court.

As to Question 3:

It was the duty of the trial judge to charge the jury on all essential questions of law. *Barron's, Federal Practice and Procedure,* Rules Edition, Volume 4, Section 2232, Page 241.

We submit that the instructions given to the jury in the instant case do not begin to measure up to this requirement.

Section 3285 (now 4401), *Title 26, United States Code,* does not impose an excise tax on wagers generally. On the contrary, the statute limits the tax to only a few forms of wagering and very closely defines the classes of wagers subject to the tax.

The statute says at the outset: "(a) Wagers.—There shall be imposed on wagers, as defined in subsection (b) an excise tax equal to 10 percentum of the amount thereof." In other words, any and all forms of gambling in which wagers are made which do not fall within the definition of subsection (b) are not subject to the tax.

Subsection (b) defines the taxable wagers as: (A) those with respect to a sport event or contest placed with a person engaged in the business of accepting such wagers; (B) those placed in a wagering pool with respect to a sport event or contest, if such pool is conducted for profit; and, (C) those placed in a lottery conducted for profit. Thus, it is immediately

seen that ordinary poker, roulette, and the like, are not taxable wagers, and many other forms of gambling could be listed which do not fall within the three forms of wagering defined in the statute.

Furthermore, subsection (b) (2) of the statute further limits the kinds of lotteries for profit which are subject to the tax by specifically excluding certain classes and kinds of lotteries, even though they may be conducted for profit.

Other sections of the statute make non-payment of the tax and failure to post or exhibit the wagering stamp required misdemeanors, and the wilfull intent to defeat or evade the tax felonies.

The references to the statute by the trial judge were inaccurate, confusing and, in many instances, at positive variance with the statute itself.

In substance and effect, the trial judge stated to the jury that the "heart of the case lies in those provisions of the law relating to person's liability for excise taxes," (R. 703) and, hence, he undertook to charge with reference to that provision of the law. He began by stating that: "The Act imposes a ten percent excise tax on all wagers placed in lotteries conducted for profit." (R. 703.) This of course, is not true, since, as we pointed out above, only certain kinds of lotteries for profit are made subject to the tax.

Throughout the entire charge, the trial judge emphasized and repeated that the law imposed the excise tax upon wagers placed on any and all lotteries conducted for profit, when the statute does not so state. The sum and substance of the court's instructions was that so long as the evidence established a lottery operation, the excise tax of 10 percentum attached. There is nothing in the charge which recognized or pointed out that it was incumbent upon the Government to prove the operation of a lottery for *profit* of the *type, kind* or *class* defined in the statute, or, to put it differently, that the jury must find that the particular lottery sought to be proved was one of those subject to the excise tax.

Where the charge has to do with failure to pay such tax, the special character or kind of wager is a necessary ingredient of the offense which must be proved beyond reasonable doubt. As was said in *Screws v. United States,* 325 U. S. 91, 89 L. Ed. 1495, 162 A.L.R. 1330, "—where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest—," the court has the inherent right to notice it sua sponte and reverse a conviction.

As to Question 9:

We take up Question 9 out of order because the misdemeanor violation is an element of the felony violation charged in the indictment. See *Spies v. U. S. 317 U. S. at 497.*

Rule 31 (c), of the *Rules of Criminal Procedure,* provides in substance, that the defendant may be found guilty of an offense necessarily included in the offense charged.

We take the position that the misdemeanor offense of willful failure or passive neglect to pay is necessarily included in the felony offense sought to be charged in this indictment. Since the only difference between the felony and the misdemeanor is one of the intent which accompanies the act or omission, the lesser offense of misdemeanor is necessarily included in the higher felony. For example, if appellant had been acquitted of the felony, he could not thereafter have been prosecuted for the misdemeanor.

It is particularly important in a case based for the most part on circumstantial evidence, as is the case here, for the jury to be told of their right to convict of the lesser offense only, if the circumstances offered proved less than the offense charged. We believe it is a right vital to the liberty of any man charged with crime that the jury be told that they do not have to convict him of the maximum crime charged.

Under the circumstances of this case, the elements of the misdemeanor were inextricably interwoven into the Government's case and it was the positive and inescapable duty of the trial judge to instruct the jury as to the elements of both the felony and the misdemeanor. This he failed to do.

As to Question 4:

It clearly appears from the reading of the pertinent statutes that the law is technical. The exceptions to the statute are a part of the definition of the crime. When the exception is an integral part of the definition it is the duty of the Government to charge and to prove that the wagers sought to be charged in the indictment were not of the kind and character excepted by the statute.

See to this effect, *Housel and Walser's, "Defending and Prosecuting Federal Criminal Cases,"* Second Edition, Section 242 (d), page 328 et seq. The text quotes at length from what appears to be the leading case of *Hale v. United States,* 1937, Fourth Circuit, 89 F(2d) 578, Judge Parker writing for the court.

As to Question 5:

We submit the case of *Clay v. United States,* 218 F(2d) 483 at 484, gives a correct statement of law on this point.

It is seen, therefore, in the trial judge's instructions, as to the vital matter of willful attempt to evade and defeat the tax, that the jury was led to believe that mere non-payment of the tax created a presumption of intent to evade or defeat it. Not only is such a proposition wholly contrary to the law above cited, but it affirmatively took away from the jury appellant's absolute right to have the jury pass upon the misdemeanor aspect of the case.

In other words, it was the trial judge's absolute duty to instruct the jury that the mere non-payment of the tax, *even though wilful* on the part of the taxpayer, was not sufficient to convict for the felony. Instead, just the contrary was done.

As to Question 8:

The opinion of the Court of Appeals attempts to distinguish the indictment in the instant case from the indictment in the *Clay* case. We submit that the instant indictment is fatally defective. It is too general. It is not sufficient, we believe, to plead the offense substantially in the language of the statute where the words of the statute do not contain all the essential elements of the offense.

The cases cited by Judge Rives are all cases that were decided long before the gambling tax statute was passed, and long before the *Spies* case was decided. We have not found any reported case decided since the Spies opinion was handed down which holds that an indictment like the one here involved would be sufficient. This indictment states conclusions rather than facts upon which the offense is based.

There can be no attempt to evade without a quo modo. The nature of the conduct essential to constitute such an attempt is set forth in *Spies v. United States,* 317 U. S. 492. It seems to us that the opinion in the instant case is contrary to the principles enunciated in *Contrares v. United States,* 213 F(2d) 96,

the *Spies* case, the *Clay* case and the old case of *United States v. Carll,* 10. U. S. 611.

As to Question 7:

Accepting the ruling of the court in the instant opinion as to the sufficiency of the indictment as to Counts 3 and 4, it seems to us clearly apparent that Counts 5 and 6 are radically different from Counts 3 and 4. The latter seek to charge a crime in the Northern District and allege an attempt which could be committed in that district. Counts 5 and 6 allege a failure to truthfully account for and pay over to the District Director of Internal Revenue, District of Florida. A failure to act or deliver can only take place at the point where action and delivery are required by law. Obviously that place was, and could only be, Jacksonville, in the Southern District.

The language in *Beaty v. United States,* 213 F(2d) 712, 715, quoted in the instant opinion, is not applicable to this situation, since there could be no failure to pay or truthfully account in the case at bar save and except at the place of the office of the District Director, to-wit: Jacksonville, Florida, in the Southern District. The *Beaty* case involved attempts to evade by maintaining false books and records and concealing assets. Beaty was engaged in committing the crime charged wherever he kept false records or concealed his assets.

For the above reasons we respectfully submit that the record affirmatively discloses that jurisdiction as to Counts 5 and 6 of the indictment could not be

in the Northern District of Florida where appellant was tried. See *Commerford v. United States*, 64 F(2d) 28, 32.

As to Question 6:

The motion for an acquittal should have been granted. The test set up in *Clay v. United States*, 218 F(2d) 483 at 484, we believe, correctly states the law.

We have examined the record in the case at bar in an effort to isolate and pick out any evidence, direct or circumstantial, which would logically or reasonably tend to prove a wilful attempt to evade or defeat the tax in question. It seems to us that the following language from the opinion of *Spies v. United States*, 317 U. S. 492-500, 87 L. Ed. 418:

> "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

states the degree of proof required. The evidence in this record does not meet this requirement. The case of *Clay v. United States*, 1955, 218 F(2d) 483, reiterates the rule in the *Spies* case.

We are completely unable to find any fact or circumstance in the record before this court that would

or could tend to prove appellant's acts anything more than mere willful omission or passive neglect to pay.

As to Question 10:

Most of the grounds we have argued were not called to the attention of the trial court. Our statement at the beginning of the argument that the Appellate Court had decided an important question which had not been, but should be settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court, may not be apt as to some of the grounds we have argued. We submit, however, that the Appellate Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power for supervision.

Rule 52 (b) of the *Federal Rules of Criminal Procedure* has been construed by the United States Court of Appeals for the Seventh Circuit in the case of *United States v. Raub,* 177 F(2d) 312, 315, to justify a reversal of a judgment of conviction based on ample evidence where the errors were substantial and capable of resulting in a miscarriage of justice.

We believe that the substantial errors in the trial of this petitioner amounted to a miscarriage of justice. It is not enough for a defendant to have a record as a law-breaker in order to put him in the penitentiary. The peculiar power and glory of our system is that every man, rich or poor, strong or

weak, law-abiding or law-breaking, is entitled to a trial in accordance with law.

As to Question 11:

The reasoning of the majority in the case of *United States v. Kahriger,* 345 U. S. 22, is directed primarily to the occupational tax. In this case we have both occupational and excise taxes. The reason why an occupational tax is not unconstitutional would not apply to an excise tax. The excise tax could only apply to past transactions.

It is significant that in the concluding paragraph of Judge Rives' opinion he uses this expression, "None of the errors complained of call for a reversal." He is a learned Judge with vast experience as an advocate. We submit that he was in error as to the motion to dismiss the indictment and the motion for an acquittal.

The new grounds which we raised on our application for rehearing he did not answer.

CONCLUSION.

WHEREFORE, we respectfully submit the Petition for Writ of Certiorari should be granted.

.....

CRAMPTON HARRIS,
1018-19 First National Building,
Birmingham 3, Alabama;

ZACH H. DOUGLAS,
Lynch Building,
Jacksonville, Florida;

W. W. JUDGE,
Daytona Beach, Florida;

FRANK S. TWITTY,
Camilla, Georgia;

CLYDE W. ATKINSON,
Centennial Building,
Tallahassee, Florida;

CHARLES R. ADAMS, JR.,
Camilla, Georgia.

PROOF OF SERVICE.

I hereby certify that I have made service of 3 copies of the foregoing Petition for Certiorari upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing same in an envelope so addressed and placing the same in the United States Post Office at Birmingham, Alabama, on the ... day of October, 1955, with sufficient postage to insure delivery.

.....

CRAMPTON HARRIS,
Attorney for Petitioner,
1018-19 First National Building,
Birmingham 3, Alabama.

I further certify that I have also mailed, in due course of mail, a copy of the foregoing Petition to Honorable Harrold Carswell, United States Attorney, Northern District of Florida, Tallahassee, Florida, and a copy to the Honorable Hayford O. Enwall, Assistant United States Attorney, Tallahassee, Florida, on this the ... day of October, 1955, with postage thereon fully prepaid.

.....

Attorney for Petitioner.

APPENDICES.

APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15284

WINSTON M. REYNOLDS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(August 23, 1955.)

Before RIVES and CAMERON, Circuit Judges, and DAWKINS, District Judge.

RIVES, Circuit Judge: This appeal is from a judgment of conviction on five counts of a six count indictment,[1] each charging a gambling tax offense. The

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[1] "First Count.

"That heretofore, on or about July 1, 1952, and continuously thereafter to and including June 30, 1953. Winston M. Reynolds of Leon County, in the Northern District of Florida, and within the jurisdiction of this Court, then engaged in the business of con-

sentences on the several counts aggregated seven years imprisonment, $12,500.00 in fines, and the costs of court. As shown in footnote 1, *supra*, the counts were in groups of two, according to the kinds of offenses charged; Counts 1 and 2, attempting to evade and defeat the payment of the wagering occupational tax, Counts 3 and 4, attempting to evade and defeat the payment of the excise tax on wagers, and Counts 5 and 6, failing truthfully to account for and pay the excise tax on wagers; and as to each offense it was charged that the same was knowingly, willfully and feloniously committed. By its verdict, the jury found the defendant "guilty as charged in Counts 2, 3, 4, 5, 6 of the indictment."

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ducting a lottery for profit, commonly known and called 'Numbers' or 'Cuba', and of accepting wagers, did knowingly, willfully, and feloniously attempt to evade and defeat the payment of the wagering occupational tax prescribed for such business and required to be paid by him during and for such period aforesaid, in accordance with the provisions of Sections 3285 and 3290 of the Internal Revenue Code of the United States.

"Contrary to the form of the statute in such case made and provided [26 USC 2707(c)] and against the peace and dignity of the United States of America."

The Second Count was identical with the First Count, except that the time alleged was "on or about July 1, 1953 and continuously thereafter to and including November 28, 1953."

"Third Count.

"That heretofore, during the month of October, 1953. Winston M. Reynolds of Leon County, in the Northern District of Florida, and within the jurisdiction of this Court, then engaged in the business of conducting a lottery for profit, commonly known and called 'Numbers' or 'Cuba', and of accepting wagers, during which month he received in wagers in the conduct of such lottery and wagering business the sum of Sixty Five Thousand Nine Hundred Twenty Three Dollars ($65,923), did knowingly, willfully, and feloniously attempt to evade and defeat the payment of the excise tax on such wagers in the sum of Six Thousand Five Hundred Ninety Two and 30/100 Dollars ($6,592.30) imposed thereupon, as prescribed therefor, and required to be paid by him on or before November 30, 1953, in accordance with the provisions of

The claimed errors relate to the following rulings of the district court: (1) denial of motion to dismiss indictment and each count thereof; (2) denial of motion for bill of particulars; (3) denial of motion to transfer case to Jacksonville Division of Southern District of Florida; (4) denial of motion for change of venue; (5) admitting telephone conversations in evidence; (6) admitting telephone toll tickets in evidence; (7) admitting photograph in evidence; (8) denial of motion for judgment of acquittal.

(1) *Motion to dismiss.* In appellant's original brief, the denial of the motion to dismiss was not specified as error but when the Government in its brief

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Section 3285 Internal Revenue Code of the United States."

The Fourth Count was identical with the Third Count, except that the time alleged was "during the month of November, 1953."

"Fifth Count.

"That heretofore, during the month of October, 1953, Winston M. Reynolds of Leon County, in the Northern District of Florida, and within the jurisdiction of this Court, then engaged in the business of conducting a lottery for profit, commonly known and called 'Numbers' or 'Cuba', and of accepting wagers, during which month he received in wagers in the conduct of such lottery and wagering business the sum of Sixty Five Thousand Nine Hundred Twenty Three Dollars ($65,923), did knowingly, willfully, and feloniously fail to truthfully account for the pay over unto the District Director of Internal Revenue, District of Florida, or his duly authorized representative, the excise tax on such wagers, in the sum of Six Thousand Five Hundred Ninety Two and 30/100 Dollars ($6,592.30), imposed thereupon, as prescribed therefor, and required to be truthfully accounted for and paid over as aforesaid, by him, on or before November 30, 1953, in accordance with the provisions of Section 3285 Internal Revenue Code of the United States and the regulations thereunder.

"Contrary to the form of the statutes in such case made and provided [26 USC 3287 and 2707(c)] and against the peace and dignity of the United States of America."

The Sixth Count was identical with the Fifth Count, except that the time alleged was "during the month of November, 1953."

called attention to the recent decision of this Court in *Clay, et al. v. United States,* No. 15,060, decided January 12, 1955, a supplemental brief on appellant's behalf was filed vigorously urging this point. The opinion in the Clay case, *supra,* does not show the exact terms of the indictment, and for convenience of reference we copy in the footnote the single count indictment in that case.[2] As will be observed, footnote 2, *supra,* that indictment alleged the *quo modo,* it charged the attempt to evade the occupational tax "*by* engaging in the business of accepting wagers * * * * * without having paid said occupational tax * * *." (Emphasis supplied.) On the other hand, the indictment in the present case (footnote 1, *supra*), pleads the offense substantially in the language of the statute, which is an approved mode of pleading with the single exception of an instance where the words of the statute do not contain all the essential elements of the offense.[3] That exception can have

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[2] "The Grand Jury Charges:

"Count One.

"That on or about the 8th day of July, 1953, in the Middle District of Georgia, Will Parks Clay, Walter Jolly, Andrew B. Turk and Andrew Morris, all of Macon, Georgia, did willfully and knowingly attempt to evade and defeat the wagering occupational taxes due and owing by each of them to the United States of America for the fiscal year ending June 30, 1954 by engaging in the business of accepting wagers, as defined in Section 3285 of the Internal Revenue Code, without having paid said occupational tax as required by Section 3290 of the Internal Revenue Code, in violation of Section 2707(c), Internal Revenue Code, as made applicable by Section 3294(c), Internal Revenue Code."

[3] Rule 7(c) Federal Rules of Criminal Procedure; United States v. DeBrow, 346 U.S. 374; Norris v. United States, 5th Cir., 152 F. 2d. 808; United States v. Williams, 5th Cir., 203 F. 2d. 572, 573.

no application here unless it be held that *Spies v. United States,* 317 U.S. 492, added a substantive element to those contained in the statute defining a similar offense; and that is not true, for the Spies case simply construed the statutory language, "willfully attempts in any manner to evade or defeat any tax * * *." 26 U.S.C.A. 145(b), I.R.C. 1939. Indeed, in income tax cases, it has been stated that an indictment need not specify the means whereby the defendant attempted to evade and defeat the tax.[4] Information as to the particular means employed may be obtained by bill of particulars.[5] As will be later shown in discussing the appellant's third insistence on error, the grounds of the motion to dismiss based on objections to the venue were not well founded. There was, therefore, no error in denying the moton to dismiss the indictment.

(2) *Bill of Particulars.* Appellant next complains in brief of the denial of his "motion for a bill of particulars calling upon the Government to allege plainly and definitely what act or acts were done by him evidencing a wilful attempt to evade or defeat the tax." Actually, there was no such motion, but the particulars called for in the motion were simply:

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[4] Capone v. United States, 7th Cir., 56 F. 2d. 927, 932; United States v. Miro, 2nd Cir., 60 F. 2d. 58, 60; United States v. Gorman, E.Dist. N.Y., 62 F.Supp. 347, 348; United States v. Bahcall, N.Dist. Ill., 116 F.Supp. 869; United States v. Trownsell, N.Dist. Ill., 117 F.Supp. 24, 25.

[5] Demetree v. United States, 5th Cir., 207 F. 2d. 892, 894.

"As to Counts Three and Five.

"1. How and in what manner the government arrived at the figure of $65,923.00 set forth in each of said counts.

"As to Counts Four and Six.

"1. How and in what manner the government arrived at the figure of $43,755.00 set forth in each of said counts."

The Government was not held to proof of the exact amounts alleged.[6] The motion for bill of particulars as filed was addressed to the sound discretion of the court,[7] and we cannot say that such discretion was abused in this case.

(3) *Motion to Transfer Case.* Appellant insists that he could have paid the occupational gambling tax and the excise taxes on wagering at but one place, the Collector's office in Jacksonville, Florida, and, hence, that the venue lay in the Jacksonville Division of the Southern District of Florida. This objection was raised also by motion to dismiss, which, we think, was the technically correct method, inasmuch as the case does not come within the rules providing for transfer.[8] In any event, there is no doubt that the objection to venue was duly presented by one method or the other. We think, however, that the venue was properly laid in the district wherein

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[6] Tickoff v. United States, 7th Cir., 86 F. 2d. 868, 878.

[7] Rule 7(f) Federal Rules of Criminal Procedure; Wong Tai v. United States, 273 U.S. 77; Johnson v. United States, 5th Cir., 207 F. 2d. 314.

[8] Rules 19, 20, 21, Federal Rules of Criminal Procedure.

the crime was alleged to have been committed. See Sixth Amendment to the Constitution of the United States. Cf. *Haas v. Henkel,* 216 U.S. 462, 474. In *Holbrook v. United States,* 5th Cir., 216 F. 2d. 238, it was alleged that the attempt to evade was "by filing and causing to be filed * * * a false and fraudulent income tax return" and, hence, the case was properly triable in the Atlanta Division, where such return was filed, rather than in the Gainesville Division where the defendant resided. We agree with what was said by the Fourth Circuit in *Beaty v. United States,* 213 F. 2d. 712, 715:

> "This contention, however, overlooks the fact that the defendant was not indicted for wilfully failing to make returns and pay the taxes in violation of Sec. 145(a), or for making returns which he did not believe to be true and correct as to every material matter, in violation of Section 145(c) of the statute, but for attempting to evade or defeat the payment of the taxes by maintaining false books and records, by concealing assets, and covering up sources of income, and by preparing and filing false and fraudulent income tax returns. It has been held in cases where the charge was confined to an attempt to evade the tax by filing a fraudulent return that the offense was committed where the returns were filed. See the conflicting decisions in United States v. Aaron, D.C.N.D. W.Va., 117 F. Supp. 952, and United States v. Albanese, D.C.S.D.N.Y., 117 F. Supp. 736. The charge in the case at bar, however, includes the making of false records and the

concealment of assets, and if any of these acts are proved to have occurred in the Western District of North Carolina, the case is made out and the trial court had jurisdiction." (See 348 U.S. 905; 220 F. 2d. 681.)

In the case at bar no returns were filed nor taxes paid. Each count of the indictment specifically charged that the crime was committed in the Northern District of Florida, and, hence, the venue was properly laid in that district.

(4) *Motion for Change of Venue.* Proceeding under Rule 21(a) Federal Rules of Criminal Procedure, the defendant moved the court "for a change of venue to another division of this district" on the ground that the trial had been so highly publicized by the press and radio broadcasts that he could not obtain a fair and impartial trial in the Tallahassee Division. In support of that motion, the defendant presented Exhibit "A" consisting of a large file of newspaper clippings and Exhibit "B" consisting of a transcript of numerous radio broadcasts, and cited many authorities culminating with *Shepherd, et al. v. State of Florida*, 341 U.S. 50. The court denied the motion for change of venue.

The defendant was indicted February 4, 1954, and the trial at which he was convicted did not commence until September 13, 1954, more than nine months thereafter. Meanwhile, in the Florida State Courts he had been found not guilty of the offense

of operating a lottery on March 14, 1954, and his first trial in the Federal Court had resulted in a mistrial on March 28, 1954. In the view of the district judge, the results of those two trials refuted the alleged grounds of prejudice.[9]

The appellant's counsel properly concede, "that much of the publicity which his case has received was a mere reporting of facts and not subject to censure." They complain particularly, however, of a news story in the Tallahassee Democrat of November 30, 1953, containing the headline, "Cuba Headquarters Uncovered." That was before either of the earlier trials and long prior to the trial at which the defendant was convicted. The date on which another article was published in the same paper headed, "Possible Leon—Phenix City Link Being Studied", does not appear either in the record or in the newspaper clipping.

Appellant bitterly complains that some of the publicity had insinuated that he was a member of a "crime ring" responsible for the death of Charlie McKinnon, a negro who had given statements to State and Federal officers against the defendant,

[9] "The Court has given careful consideration to said motion, the argument of counsel in support thereof, the leading authorities relied upon and finds no merit therein. The record of the trial of defendant in the Circuit Court of Leon County, Florida and in his previous trial in this Court refute the alleged grounds of prejudice stated in said motion for a change of venue. In the opinion of this Court the opportunity for defendant to obtain a fair and impartial trial are (sic) as good, if not better, in the Tallahassee Division of this Court as in any other Division of the District."

and who was found dead in a ditch near his home in Pelham, Georgia, on January 10, 1954. A warrant charging defendant's employee, Al Tharpe, with the murder of McKinnon was issued, but on preliminary trial in the City Court of Camilla, Georgia, the judge ruled that "the State has failed to make a case for binding this defendant over to the grand jury," and discharged Tharpe. That was on May 8, 1954, more than four months before the trial at which defendant was convicted. McKinnon had been killed, as has been stated, on January 10, before the defendant's acquittal in the State Court, and before his first trial in Federal Court resulting in a mistrial; and most of the adverse publicity seeking to connect the defendant with his death was prior to either of said earlier trials. The discharge of defendant's employee, Tharpe, after those two trials might reasonably be expected to mitigate somewhat the effects of such adverse publicity, even though articles concerning "New Evidence" continued to be published as late as July 22, 1954.

The appellant complains further, that more bad publicity plagued him subsequent to his two earlier trials due to his trial and conviction for contempt of court in tampering with the jury on his trial for violation of the State lottery law. At the time of his sentence for contempt, he admitted talking to a member of the jury venire but denied any evil intent. The Florida Supreme Court refused to review his conviction, and he served sixty days for contempt of court, beginning the week of May 28, 1954, and con-

cluding therefore over a month and a half before the trial in Federal Court at which he was convicted. That complaint reminds us of the old saw about the boy who slew his parents and then pleaded for mercy because he was an orphan. The defendant brought that bad publicity on himself.

Notwithstanding that fact, however, he was entitled to a fair trial, free from bias or prejudice, on the present indictment. In this connection, we observe that not a single witness testified that the defendant could not get such a trial in the court in which he was prosecuted. The record of the trial shows that the court instructed the jurors not to read newspapers nor to listen to radio broadcasts while the trial was in progress, but it does not disclose the questions asked the jurors on voir dire. One of the newspaper clippings, however, discloses that the court excused two of the panel members for cause when they admitted that recent publicity "had caused them to form opinions as to guilt or innocence." More important, the record does not disclose the places of residence of the jurors, nor in which divisions of the judicial district they resided. For aught that appears, the jurors were drawn from divisions other than the Tallahassee division of the court, where the prejudice was claimed to exist. The burden, of course, rests upon the appellant to show error in the court's ruling. Finally, we have carefully read and considered the voluminous exhibits of newspaper clippings and transcripts of radio broadcasts, and we cannot say that the district court abused its dis-

cretion in denying a change of venue. See *Kersten v. United States*, 10th Cir., 161 F. 2d. 337, 339.

(5)-(8). *Questions on Admissibility and Sufficiency of Evidence.* Expert testimony as to the operation in Florida of the illegal lottery,[10] commonly known as "Numbers", "Cuba" or "Cuba bolita", explained the use therein of various printed slips, of adding machines, short-wave radios, the types of telephone messages to be expected, and the usual times when such telephone communications would occur.

Since 1909 a legal national lottery has been operated by the Government of Cuba. Three winning numbers are announced by short-wave radio broadcast from Havana usually on each Saturday afternoon between the hours of 2:00 and 8:00. As "Cuba" is played in Florida, the "hit" or winning number is determined by the last two numbers or digits of the "primary" or grand prize number of the Cuban National Lottery.

The bets are placed on numbers from 1 to 100. The winning number usually pays seventy times the amount bet. The seller has a small pad on which he records in duplicate the amount bet, the number on which the bet is placed and some symbol of identification, one copy being given to the player and the seller keeping the other copy. On Friday night or Saturday morning, the sales are "closed," the

[10] Unlawful in that State. Secs. 849.09—849.13 Florida Statutes, 1953; Fraterrigo v. State, 10 So. 2d. 304.

seller tallies up the money collected on each number on a "tally sheet" and the "pickup man" collects the "tally sheets" and money from the many sellers operating under him. He then compiles the information on a "master tally sheet" and reports to the "banker" at least one or two hours before the "close out time." If a larger amount is bet on a given number than the banker can afford to lose or cares to risk, he usually has another and bigger banker to whom he can "lay off" the excessive amount. "Close out time" is normally about noon on Saturdays, or one or two hours before the time for announcement in Cuba of the winning number, long enough to enable the banker to make his computations and "lay offs" if necessary.

A pickup man reporting to his banker by telephone usually recites merely the figures or numbers representing the amount of money bet on each number from one to one hundred. The banker communicates with his "lay off" usually by phone; and, after getting the winning number over short-wave radio, the banker communicates that to his pick up men, who in turn communicate it to their sellers.

The pickup man often pays off the winner, if any among his players, and if his collections are sufficient, allows the sellers to deduct their commissions, usually fifteen per cent of the gross sales, and settles with the banker for the net collections. The banker would be expected to have varying amounts of cash on hand on Saturday afternoons, depending on

whether many of the pickup men report in person or by phone to the banker.

Prior to November 1, 1951, there had been no Federal tax applicable to the operation of a Cuba Bolita lottery in Florida. The Acts on which the present indictment was based, 26 U.S.C.A, 2707(c), 3285 and 3287, became effective November 1, 1951. (See Note preceding 26 U.S.C.A. 3285 I.R.C. 1939). The appellant had on prior occasions admitted to at least two Internal Revenue representatives that, when there was no Federal tax applicable, that is prior to November 1, 1951, he engaged as a banker in the operation of a Cuba Bolita lottery. He told one of these agents that he had employed a fictitious name, C. W. Harris, in his lottery operations. Ray Wilson Smith, manager of A. L. Sealey Company, commercial printers in Albany, Georgia, testified that since about June 21, 1950, he had printed the various slips and forms used in the lottery, ostensibly upon the order of "C. W. Harris," that the appellant was not "one of the half a dozen people who represented themselves to be C. W. Harris," but that he did accompany one of such persons on an occasion when the gambling tax Act was being considered in Congress, and that, knowing that the printing had to do with a lottery, "I said to the two of them, I said 'What is going to happen if this gambling tax stamp goes through?', and Mr. Reynolds said, 'If it goes through I am going to retire and take a trip around the world' or words to that effect." Nevertheless, on December 30, 1952, three work orders for the kind of printing used in the

lottery were given to Sealey Printing Company in the name of C. W. Harris. This was after the appellant, upon his request, had been fully informed about the tax law by the Internal Revenue agent. Long distance toll tickets, required to be kept in the regular course of its business by the Southeastern Telephone Company at Tallahassee, Florida, reveal long distance collect calls from Albany, Georgia, telephone number 1947, one of the telephone numbers of the Sealey Printing Company, to the Tallahassee telephone numbers 2-8242 and 2-2594, located in the garage office at Beechwood Farms, appellant's place of operation, on December 31, 1951, March 11, 1952, and February 17, 1953. Each ticket reflects Smith of the Sealey Printing Company to be the caller.

Appellant operated, or had operated, two legitimate businesses, and the Government's theory was that these were mere "fronts". One was a sporting goods sales business, now and for some time past in liquidation. The other was "Acme Taxi Neon Company", which showed losses some years and profits in others. Income tax returns revealed that appellant had made advances to the two businesses in excess of $100,000.00.

On Saturday, November 28, 1953, a search warrant for appellant's premises, Beechwood Farms, was issued by the County Judge of Leon County, Florida. In the search, seventeen locations for telephone communication, with four trunk lines, were found on the place, the phones being listed under the names of the two legitimate businesses, of C. W. Shelton, appellant's brother-in-law, and of Joe D. Lambert, a former business associate. Two secret compartments

with concealed trap doors were found in closets, one of them empty, and the other containing slips and pieces of paper, obviously used in a Cuba lottery, with numbers marked or indicated which corresponded with the actual winning numbers on the Cuban National lottery for the Saturdays of each week from October 3, through November 21, 1953.

While the raiding officers were present in appellant's office, they answered eight incoming telephone calls; three were unrelated to the case; three consisted principally of the calling off by the caller of a series of numbers in a manner peculiar to the methods of telephonic reporting to a Cuba bolita headquarters, one, from Miami, asked for the appellant by name, and wanted to know, "What you got for me?" and hung up when appellant could not talk in person. The officers inferred that this call was from appellant's "lay off." The remaining call was from a Mrs. W. E. Harrell, whose husband had been with the appellant when the officers arrived on the raid. Her conversation, as related by the Sheriff, is set forth in the margin.[11]

Long distance toll tickets of telephone calls both incoming and outgoing on a succession of Saturday afternoons, typical of telephonic communication in

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[11] "I answered the phone—the conversation went on and I told her 'what is it' or 'Go ahead' or something like that, and I acted as though I was very busy. She asked me, thinking that I was the boss or Winston,—

"The Court:

"You don't know what she thought, she asked you without knowing who you were?

"A. Excuse me Judge. She asked me if I knew her husband had been put in jail in Tallahassee. I told her yes but not to worry about it. She said—I can't quote this conversation verbatim—she

the conduct of a lottery business, were received in evidence over appellant's objection.

The evidence of the telephone conversations received by the raiding officers was competent, we think, as circumstantial evidence going to show the operation of a lottery. *Beard v. United States*, D.C. Cir., 82 F. 2d. 837, 841; *Billeci v. United States*, D.C. Cir., 184 F. 2d. 394, 397; *United States v. Lewis*, D.C. Dist.Ct., 87 F. Supp. 970, 974; *Braswell v. United States*, 5th Cir., 200 F. 2d. 597, 599; 20 Am. Jur., Evidence, Sec. 457; 31 C.J.S., Evidence, Sec. 239.[12]

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said that she was scared to death, that she had removed the stuff out of the store and wanted to know what to do with it. I told her to get it all over to Tallahassee as quick as she could.

"Q. Had removed what out of the store?

"A. The stuff. She referred to it as the stuff, she wanted to know what to do with it. I told her to get it over to Tallahassee just as quick as she could. She said, 'Well, you meet me.' I said, 'No, you know I am just as busy as the devil, or I used some slang or cuss word in there,' 'you must know that, and get it all over here.' She said, 'How am I going to get it over there?' I said, 'I don't care, get it here any way you can, and I will have somebody meet you.' She said, 'I will be in a negro taxi and will meet you at Talquin Inn.' I said, 'No, I won't be there, but I will have a man there, he will be sitting in front of Talquin Inn, in a brown Chevrolet.' I said, 'When you come in have the taxi driver turn off the Quincy Highway onto the Blountstown Highway, and that brown Chevrolet will be sitting there in front of Talquin Inn and you have him circle around and go on out on the Blountstown highway and the brown Chevrolet will follow you.' I said, 'That car will then follow you and pick up the stuff from you there.' The conversation ended with that understanding. I went personally out there to make the contact, but there was no result to this contact."

[12] The grounds of objection to the various telephone conversations did not in any way refer to the Fourth or Fifth Amendments to the Constitution nor to the "Wire Tapping Act," 47 U.S.C.A. 605, nor are such grounds of objection urged in brief. See, however, Nardone v. United States, 302 U.S. 379; Weiss, et al. v. United States, 308 U.S. 321; Billeci v. United States, supra; Sullivan v. United States, D.C. Cir., 219 F. 2d. 760, 762. We have not, therefore, considered such grounds of objection. Rule 51 Federal Rules of Criminal Procedure; On Lee v. United States, 343 U.S. 747, 749, n. 3. See, also, cases collected in Key Numbered Federal Digest under Criminal Law, Sec. 695.

The telephone toll tickets were likewise admissible as circumstantial evidence. See same authorities and, also, *Duncan v. United States,* 5th Cir., 197 F. 2d. 935; *Blakeslee v. United States,* 1st Cir., 32 F. 2d. 15, 17; *United States v. Radov,* 3rd Cir., 44 F. 2d. 155, 157; *Brink v. United States,* 6th Cir., 60 F. 2d. 231, 234; *Wood v. United States,* 5th Cir., 84 F. 2d. 749, 751; *Jarvis v. United States,* 1st Cir., 90 F. 2d. 243, 245; *United States v. Gallo,* 2nd Cir., 123 F. 2d. 229, 231; *United States v. Novick,* 2nd Cir., 124 F. 2d. 107, 110; *Dolff v. United States,* 7th Cir., 61 F. 2d. 881, 884, cert. den'd 287 U.S. 763.

Various adding machines and typewriters, a short-wave radio set, and other equipment seized in the raid, after being gathered together were photographed in one room, and the defendant objected to the introduction of that photograph after the conditions had been altered and the equipment placed, according to appellant, in posed positions. The photographer testified that there was no effort to pose or stage the photograph. The officers made it clear that the equipment had been collected from various locations for hauling away. We do not think that the jury could possibly have been misled by this photograph or that there was any error in permitting its introduction.

When the raid occurred, the appellant requested the officers to release two young boys working in the Taxi Neon shop, exclaiming, "I am responsible for all this—they have nothing to do with this!" Other remarks were made during the raid in which the defendant assumed full responsibility for whatever

operations were found. When the first telephone call came in, appellant undertook to warn the caller by shouting in the direction of the phone, "Police—it's the police." Over $1,600.00 was found on the person of a woman employee. Further details are unnecessary to demonstrate that the evidence was ample to justify denial of the motion for judgment of acquittal. None of the errors complained of call for a reversal. The judgment is therefore

AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.,
Clerk.

(Seal)

By CLARA R. JAMES,
Deputy Clerk of the United States Court of Appeals for the Fifth Circuit.

Judgment.

Extract from the Minutes of August 23, 1955.

No. 15,284.

WINSTON M. REYNOLDS,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Order Denying Rehearing.

Extract from the Minutes of September 29, 1955.

No. 15,284.

WINSTON M. REYNOLDS,

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the Petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX "B".

Section 3285. Tax

(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. For the purposes of this chapter—

(1) The term "Wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary,

that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, Sec. 471(a), 65 Stat. 529.

Section 3290. Tax

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who

is engaged in receiving wagers for or on behalf of any person so liable. Added Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, Sec. 471 (a), 65 Stat. 529.

Section 3294. Penalties

(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, Sec. 471(a), 65 Stat. 529.

Section 2707. Penalties

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of

a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

Section 3297. Applicability of federal and state laws

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of such tax prohibit any State from placing a tax on the same activity for State or other purposes. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, Sec. 471(a), 65 Stat. 529.

Section 3291. Registration

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, Sec. 471 (a), 65 Stat. 529.

Federal Rules of Criminal Procedure

Rule 52. Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 31. Verdict

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Florida Statutes, Annotated, Volume 22, Section 849.09, Cumulative Pocket Parts, 1954, Page 64, reads in part as follows:

849.09. Lottery Prohibited

(1) It shall be unlawful for any person in this state to:

(a) Set up, promote, or conduct any lottery for money or for anything of value;" * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 474

WINSTON M. REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 31-49) is reported at 225 F. 2d 123.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1955, and a petition for rehearing was denied on September 29, 1955 (Pet. 50, 51). The petition for a writ of certiorari was filed on October 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in its final charge to the jury.

2. Whether an indictment charging willful attempt to evade and defeat wagering occupational and excise taxes should have been dismissed for faiiure to allege the specific means of such tax evasion.

3. Whether the evidence was sufficient to sustain petitioner's conviction.

4. Whether the venue as to counts 5 and 6 of the indictment was properly laid in the Northern District of Florida.

5. Whether the tax on money received from wagering is unconstitutional.

STATUTES AND RULES INVOLVED

At the times here involved, the relevant sections under 26 United States Code (1952 Ed.) read as follows:

Section 3285. Tax.

(a) Wagers.

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions.

For the purpose of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager

placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers-game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager.

In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax.

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wa-

gers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax.

No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent.

The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

Section 3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this

subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.

Section 3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

Section 3294. Penalties.

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * * * *

(c) Willful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

Section 2707. Penalties.

* * * * *

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the com-

putation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on

the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 31(c). CONVICTION OF LESS OFFENSE.

The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Florida Statutes, 1953, Section 849.09 provides:

Lottery Prohibited.

(1) It shall be unlawful for any person in this state to:

(a) Set up, promote, or conduct any lottery for money or for anything of value;

* * *

STATEMENT

Petitioner was charged in a six-count indictment, in the United States District Court for the

Northern District of Florida, with gambling tax offenses in violation of 26 U.S.C. (1952 Ed.) 3285, 3287, 3290, and 2707 (c) (*supra,* pp. 2-6), as a result of conducting a lottery for profit known as "Numbers" or "Cuba". Counts 1 and 2 charged attempting to evade and defeat payment of the wagering occupational tax (R. 1-2); counts 3 and 4, attempting to evade and defeat payment of the excise tax on wagers (R. 2-3); and counts 5 and 6, failing truthfully to account for and pay the excise tax (R. 4-5). The jury found petitioner guilty on counts 2, 3, 4, 5 and 6 (R. 717). He was given consecutive sentences of imprisonment, under counts 2, 3, and 4, for a total of 7 years, and fined an aggregate of $12,500.00 on counts 5 and 6 (R. 719-720, 723). On appeal (R. 724-725), the conviction was unanimously affirmed (Pet. 50).

The evidence may be summarized as follows:

Since 1909 a legal national lottery has been operated by Cuba (Gov. Ex. 52; R. 353, 354, 357). The winning numbers are usually announced by short-wave radio from Havana, Cuba, on Saturday between 2:00 and 8:00 p.m. (R. 389). Conducting a lottery in Florida is illegal under Section 849.09 of the Florida Statutes, 1953 (*supra,* p. 7). As the illegal game of "Cuba" is run in Florida, the "banker" furnishes the money to bank the lottery, and has "pick-up men" and "sellers" assisting him. The various pay-offs are made after the Saturday results are received over short-wave radios. (R. 387-394, 444-445.)

Prior to November 1, 1951 (the date the statutes involved in the indictment became effective), there had been no federal tax on operation of the Cuba lottery in Florida. Petitioner, in August 1952, told an Internal Revenue agent that he had been in the Cuba lottery business until October 31, 1951, and showed the books covering these financial operations (R. 466, 467, 498). Petitioner stated that he had been the banker of the organization, and had 15 head writers, each of whom had some 5 to 25 sellers (R. 475).

In June 1951, while an Internal Revenue agent was investigating the tax affairs of one Brannon, petitioner informed the agent that Brannon was his numbers operator in Valdosta, Georgia, and that his (petitioner's) base of operations was Beechwood Farms in the Tallahassee, Florida area. (R. 245-247, 34.)

In the early part of November 1951, upon his request, petitioner received from the office of an Internal Revenue agent at Tallahassee a copy of the new 1951 revenue act, including the gambling tax stamp statutes (R. 325-327).

On December 30, 1952 three work orders were given to A. L. Sealy Co., a commercial printer, for printing of numbers slips (Gov. Ex. 28-30, R. 229-230, 235, 246). Records were introduced of long distance telephone calls between this printing company and petitioner's Beechwood Farms on December 31, 1951, March 11, 1952, and February 17, 1953 (Gov. Ex. 51, R. 305-306, 244).

Petitioner was the president of the Acme Indian Sales and its subsidiary, Acme Taxi Neon (R. 331). The corporation as a whole lost money (R. 521-522), and petitioner provided the money to make up for its losses (R. 335). As of July 31, 1954 an audit showed that petitioner had advanced a total of $102,492.33 to both divisions of the corporation (R. 332).

On November 28, 1953 state officials, proceeding under the authority of a state search warrant, conducted a search of petitioner's premises at Beechwood Farms (R. 30-31). Petitioner consented to the search (R. 35, 200). The officers found an elaborate system of telephones, listed under the names of the two businesses, petitioner's brother-in-law, and a former business associate (Gov. Ex. 41-44, R. 290-293, 308-311). In a secret compartment in a trap door of a closet the officers found numerous papers and slips used in conducting a lottery (Gov. Ex. 2-16, R. 37, 39-40, 50, 87-89, 130-131). They also seized four adding machines (Gov. Ex. 17-20, R. 43-44, 72) and a short-wave radio (Gov. Ex. 21, R. 44, 107) capable of receiving broadcasts from Havana, Cuba (R. 211).

Papers obtained in the search were marked with numbers corresponding with the winning numbers of the Cuba lottery from October 3 through November 21, 1953 (Gov. Ex. 3-10; Gov. Ex. 53; R. 396-400, 454-461). Some of these were printed slips furnished by the printer, A. L. Sealy Co. (R. 235).

While the officers were on the premises, they wrote down lists of numbers which were telephoned in by petitioner's out-of-town operators on three different calls (Gov. Ex. 25, R. 66, 90, 91-92, 94; Gov. Ex. 26, R. 132-134, 136-137; Gov. Ex. 27, R. 138-141). On one of these calls petitioner shouted into the mouthpiece of the phone which the officer was answering, "Police, it's the police." (R. 90-91).[1]

In one long distance call from Miami, when the officer said that petitioner was not there, but that he would take the information, the caller replied, "No, no, Coco talk to Mr. Reynolds," and then hung up (R. 99, 125). Another incoming call was made from Quincy, Florida, by a Mrs. Harrell, whose husband was with petitioner at the time of the search and had been put in jail (R. 202). After Mrs. Harrell said she did not know what to do with the "stuff" she had removed from the store, the officer told her to bring it to Tallahassee at a certain meeting place, but the contact was never made (R. 76-77, 173-175).

At the time of the search $1639.69 was taken from a woman employee of the petitioner (R. 209, 224-225). In requesting that the sheriff release two young boys employed by him, petitioner said,

[1] There was also evidence of a series of long distance telephone calls at the Beechwood Farms, both incoming and outgoing, on Saturday afternoons (Gov. Ex. 34, R. 264; Gov. Ex. 36, R. 273, 274; Gov. Ex. 38, R. 278, 279; Gov. Ex. 45, R. 298; Gov. Ex. 45A, R. 431-432; Gov. Ex. 46, R. 298; Gov. Ex. 46A, R. 430; Gov. Ex. 48, R. 302; Gov. Ex. 48A, R. 433; Gov. Ex. 49, R. 303; Gov. Ex. 49A, R. 437; Gov. Ex. 50, R. 304, 305; Gov. Ex. 50A, R. 433, 434).

"I am responsible for all of this. They have nothing to do with this" (R. 185). Petitioner told the sheriff, "You've got me. Make a good case against me" (R. 55).

The gross total of lottery sales for the four weeks in October 1953 was $65,923.00, with a 10% excise tax of $6,592.30 due; for the three weeks in November 1953, the total was $43,755.00, with a 10% tax of $4,375.50 (Gov. Ex. 60, R. 462, 463, 473-474). The gambling occupational tax for the period from July 1, 1953 through June 30, 1954 was $50.00 (R. 463).

An agent in the office of the District Director of Internal Revenue in Jacksonville, Florida testified that no application for, or purchase of, the federal gambling occupational stamp was made by petitioner for the period of July 1, 1952 through November 28, 1953; and that petitioner, during this period, did not pay any excise tax on wagers (R. 327-329).

ARGUMENT

1. In this Court, petitioner's principal challenge is to various portions of the trial court's charge. These contentions, however, are not timely under Rule 30 of the Federal Rules of Criminal Procedure (*supra*, p. 6); the record does not disclose any objection to the charge as given (see R. 716). Indeed, not only did petitioner fail to object to the charge before the jury retired; he failed to challenge the instructions in his motion for a new trial (R. 720-721) and he failed again to challenge them in his appeal to the Court of Appeals (see Pet. 33).

While petitioner offers no explanation for these repeated failures and presents no reasons why this Court should undertake to consider the various questions which he now raises here for the first time, we nonetheless address ourselves to the various objections which he makes to the charge.

a. Petitioner complains of the part of the charge, appearing at R. 714, which stated that all the jury had to find was that petitioner was the banker in the lottery operation for profit. It is said that this resulted in an unauthorized direction of a verdict against petitioner and that it improperly reduced the case to the question whether the Florida lottery laws were being violated. (Pet. 16-18, 3-4.)

The challenged language, however, is to be read in the context of the entire charge. *Boyd* v. *United States,* 271 U. S. 104, 107. Previously, the court had set out the nature of the charges in the six counts of the indictment (R. 702-703, 707); described both the 10% excise tax (R. 703-705) and the occupational tax (R. 705-706); and fully covered the issue of intent under a charge of willful attempt to evade and defeat taxes (R. 707-709). Throughout its charge, the court emphasized the requirement that petitioner could be convicted only if found guilty beyond a reasonable doubt (R. 703, 710-711). Immediately preceding the language criticized by petitioner, the court instructed (R. 713):

> Let me say to you in that connection that [petitioner] is not on trial here for conduct-

> ing a lottery for profit. If he is guilty of any such conduct that particular offense belongs in the State Court and not in this Court, but I do charge you that before you can find him guilty of the violation of the Federal Law, which I have outlined to you, that is our tax law with reference to lottery operations, it is necessary that you satisfy yourselves beyond a reasonable doubt that [petitioner] was at the time charged in the several counts of this indictment, engaged in conducting a lottery for profit.

Under the facts of this case, the issue that was really in dispute was whether petitioner was the person who had the duty to pay the taxes. There was no doubt under the evidence that a lottery was in operation; that various means had been taken to conceal its operation and its receipts (from which the duty to pay the tax would flow); and that no taxes had in fact been paid. As the judge had already charged, the amount of taxes was not the issue, but rather the intent to evade a tax (R. 709) which clearly had not been paid. Thus the judge could properly and consistently point out to the jury that the heart of this case was not the "complicated tax requirement" but the duty of paying the tax, *i.e.* whether petitioner as the "banker" was the person required to pay (R. 714). The instruction was neither incorrect nor misleading.

b. Petitioner contends that the court erred in charging that the statute imposed a 10% excise tax on "all wagers placed in lotteries conducted for

profit" (R. 703), whereas 26 U.S.C. 3285(b)(2) (*supra*, p. 3) provided certain exceptions to the term "lottery" which the trial court failed to spell out in its instructions (Pet. 19-21, 23, 4-5). The contention lacks substance.

The charge fully covered lotteries of the type here involved (R. 703-704). Petitioner made no claim, and there was no evidence to show, that he came within an excepted lottery operation under Section 3285(b)(2); nor did he request any instruction to this effect. It was not necessary that the prosecution negative these obviously inapplicable exceptions; rather it was incumbent upon petitioner to establish exemption if he thought his lottery operations fell within the exceptions. Cf. *McKelvey* v. *United States*, 260 U. S. 353, 356-357; *Edwards* v. *United States*, 312 U. S. 473, 482-483.

c. Petitioner contends that the misdemeanor offense described in 26 U.S.C. 2707(b) (*supra*, p. 5) is necessarily included in the felony offense set forth in 26 U.S.C. 2707(c) (*supra*, p. 6) with which he was charged, and that the failure to instruct the jury concerning the lesser offense constituted a failure to comply with the requirements of Rule 31(c) of the Federal Rules of Criminal Procedure (*supra*, p. 7). Assuming that the instruction would have been appropriate in the event petitioner had requested it, the fact remains that no such request was made. Petitioner is in no position to complain that the trial court abused its discretion in failing to give an instruction which he, himself, did not seek. See *Himmelfarb* v.

United States, 175 F. 2d 924, 944 (C.A. 9), certiorari denied, 338 U.S. 860. A similar point was raised in this Court in *Gariepy* v. *United States,* No. 103, this Term, certiorari denied, October 10, 1955, involving a charge of willful attempt to avoid income taxes. There, as here, no request for a "lesser-included" instruction was made to the trial court and the issue was first presented in this Court.

d. Petitioner argues that the court's charge improperly equated mere non-payment of the tax with a willful attempt to evade and defeat it (Pet. 23-24, 5). This is said to follow from the part of the charge set out in the margin.[2]

But the quoted sentence is not to be read in isolation. It was accompanied by instruction that proof of the offense required a showing of "intent to evade and defeat the tax and some act or acts done in furtherance of such intent" (R. 708). The court also described what the word "intent" contemplated; explained that there are various means of evading a tax; stated the requirements for a willful attempt to evade; and instructed that the question of intent was a matter for the jury's determination (R. 708). The charge thus made clear that mere non-payment of the tax was insufficient

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[2] "The presumption is that a person intends the natural consequences of his act, and the natural presumption would be, if a person consciously, or intentionally, did not register as required by the Internal Revenue regulations made applicable for the issuance of the gambling tax stamp, and pays the occupational taxes and thereby the government did not receive such taxes, that he, the defendant, intended to defeat the tax" (R. 708).

to constitute a felony, and that some additional affirmative act showing an attempt to evade the tax was required. While not sufficient of itself to constitute a felony, non-payment, of course, was a circumstance to be considered by the jury in determining whether petitioner was guilty of the felony of attempting to evade the tax. Cf. *United States* v. *Kafes*, 214 F. 2d 887, 890-891 (C.A. 3), certiorari denied, 348 U.S. 887.

2. There is no merit to petitioner's contention that the indictment (R. 1-5) was improper for failure to plead the means by which he attempted to evade the tax (Pet. 24-25, 5).

The indictment set forth the essential elements of the felony charged under 26 U.S.C. 2707(c) (*supra* p. 6), in plain, concise, and definite language, sufficiently apprising petitioner of the charges he had to meet, and enabling him to plead a formal acquittal or conviction, in the event that other proceedings might be taken against him for similar offenses. *United States* v. *Debrow*, 346 U.S. 374, 376; *Hagner* v. *United States*, 285 U.S. 427, 431. Pleading the offense substantially in the language of the statute, as was done here, was permissible. There is an exception to this rule where the words of the statute do not contain all the essential elements of the offense. *Norris* v. *United States*, 152 F. 2d 808, 810 (C.A. 5), certiorari denied, 328 U.S. 850. *Spies* v. *United States*, 317 U.S. 492, upon which petitioner relies, does not show that this case is exceptional. As the court below held (Pet. 35):

> * * * the Spies case simply construed the statutory language, "willfully attempts in any manner to evade or defeat any tax * * *." 26 U.S.C.A. 145(b), I.R.C. 1939.

In *Spies* the propriety of the charge to the jury was the decisive issue; the case did not hold that the specific affirmative conduct constituting the evasion of the tax must be alleged in the indictment.

The court below had previously held, in *Clay* v. *United States,* 218 F. 2d 483, 484, that where an indictment undertook to spell out the means of evasion, and in so doing relied merely on the fact of non-payment, there was a failure to allege an offense under the felony statute. But, as the court noted in the instant case (Pet. 34-35), this was not a holding that the means had to be alleged in the indictment. By alleging willful attempt to evade, the indictment alleged more than mere non-payment, and the evidence to support that charge had to prove more than mere non-payment.

An analogous situation is involved in income tax cases, in which it has been held unnecessary to set out in the indictment the specific means by which the accused attempted to evade and defeat the tax.[3] *Capone* v. *United States,* 56 F. 2d 927, 931 (C.A. 7), certiorari denied, 286 U.S. 553; *United States* v. *Miro,* 60 F. 2d 58, 60-61 (C.A. 2); *United States*

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[3] Petitioner might have asked in his bill of particulars (see R. 16-17, 15; Pet. 35-36) for a statement of the means by which he evaded the tax, but he did not do so.

v. *Bahcall,* 116 F. Supp. 869 (N.D. Ill.); *United States* v. *Simmons,* 96 U.S. 360, 363-364.

3. The evidence in this case showed far more than a mere omission to pay (see Pet. 5, 26-27). The jury could properly infer willful attempt at evasion from the elaborate means of concealment used by petitioner—the maintenance of numerous telephone lines in the names of others, the use of a secret compartment to conceal records, the advancement of large sums of money to his "front" corporations. The exhaustive review of the evidence by the court below disposes of the contention that a judgment of acquittal should have been granted. There is no occasion for further review by this Court. See *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.

4. Petitioner maintains that as to counts 5 and 6, charging willful failure to "truthfully account for and pay over unto the District Director of Internal Revenue, District of Florida, or his duly authorized representative" the excise taxes, the only proper venue was in the Southern District at Jacksonville, the office of the District Director (Pet. 25-26, 5). Prior to trial petitioner had filed a motion for transfer of the trial from the Northern to the Southern District, but this had been overruled (R. 5-8).

The court below correctly held that venue in the Northern District was proper. Cf. *Beaty* v. *United States,* 213 F. 2d 712, 715 (C.A. 4); *Haas* v. *Henkel,*

216 U.S. 462, 473-474; *United States* v. *Albanese*, 117 F. Supp. 736, 738-739 (S.D. N.Y.). Petitioner filed no returns and paid no taxes to the District Director at Jacksonville. The activities constituting his failure to account occurred in the county of his residence and principal place of business in the Northern District of Florida.[4] Thus the prosecution was in the district where the crime occurred.

5. Petitioner assigns no reasons, not already considered by this Court in *United States* v. *Kahriger*, 345 U.S. 22, in support of his contentions that the tax provisions involved are unconstitutional. See also *Lewis* v. *United States*, 348 U.S. 419. Indeed, he ignores the fact that the issue on which there was a division of opinion in the Court —the validity of the registration provisions—is not involved in this proceeding. His argument that the 10% tax is unconstitutional because it follows, rather than precedes, the taking of wagers ignores the numerous cases which have held that illegality of a source of income is not an excuse for failure to pay the tax. *United States* v. *Yuginovich*, 256 U.S. 450; *United States* v. *Stafoff*, 260 U.S. 477, 480; *Rutkin* v. *United States*, 343 U.S. 130, 137,

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[4] See 26 C.F.R. 1955 Supplement, § 325.30: "Every person required to pay the tax on wagers imposed by section 3285 of the Code shall prepare each month from the daily records required by § 325.32 a return, in duplicate, on Form 730 in accordance with the instructions thereon. The original return, together with the amount of the tax, shall be filed with the collector of internal revenue for the district in which is located the office or principal place of business of the person required to make the return. * * *"

140; *Johnson* v. *United States,* 318 U.S. 189; *United States* v. *Sullivan,* 274 U.S. 259.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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